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Nos. 84-256 and 84-292

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROY L. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

THOMAS F. O'MALLEY AND ANDREW G. MASSA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether electronically intercepted conversations that were evidence of bribery are inadmissible because they were obtained by agents while lawfully executing a warrant that authorized the interception of conversations pertaining to another offense.

2. Whether evidence obtained pursuant to an extension of a warrant authorizing a wiretap must be suppressed on the ground that the application for the extension was insufficient, even though the application established probable cause and any defects in it tended to diminish, not increase, the likelihood that a warrant would issue.

3. Whether the court of appeals applied an incorrect standard in reviewing the district court's determination that statements in a warrant application were not intentionally false or made in reckless disregard of the truth.

4. Whether the admission against petitioners of statements by co-conspirators violated the Confrontation Clause of the Sixth Amendment.

5. Whether petitioners are entitled to relief on the basis of newly discovered evidence of an alleged violation of the rights of a co-defendant who is not before the Court.

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ROY L. WILLIAMS, PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a)[1] is reported at 737 F.2d 594. The opinion of the district court denying petitioners' motions to suppress

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 84-256.

evidence (Pet. App. 44a-131a) is reported at 542 F. Supp. 345. The opinion of the district court denying petitioners' motion for a new trial (84-292 Pet. App. 41a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 41a) was entered on June 8, 1984. A petition for rehearing (Pet. App. 42a-43a) was denied on July 12, 1984. The petition for a writ of certiorari in No. 84-256 was filed on August 16, 1984; the petition in No. 84-292 was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on all 11 counts of an indictment charging conspiracy to bribe a United States Senator, in violation of 18 U.S.C. 371; interstate travel to promote the bribery, in violation of 18 U.S.C. 1952; and wire fraud, in violation of 18 U.S.C. 1343 (Pet. App. 1a). Petitioner Williams was sentenced to the maximum term of imprisonment, pursuant to 18 U.S.C. 4205(c), in order to permit a study of his health; the district court indicated that the sentence will be reduced when the study is complete. Pet. App. 6a. Petitioner O'Malley was sentenced to a 30-month term of imprisonment, to be followed by five years' probation. Petitioner Massa was sentenced to imprisonment for a year and a day, to be followed by five years' probation. The district court also fined petitioner Williams $29,000.

The evidence showed that petitioners, together with co-defendants Allen Dorfman and Joseph Lombardo

and unindicted co-conspirator William Webbe,[2] devised and pursued a scheme to bribe a United States Senator at the expense of the Teamsters' Central States Pension Fund.[3] The scheme involved the proposed purchase of a piece of property ("the Wonderworld property") in Las Vegas, Nevada, near the residence of Senator Howard Cannon. Pet. App. 2a-3a. The government's evidence consisted in large part of conversations surreptitiously intercepted and recorded pursuant to court-ordered wiretaps (*id.* at 7a).

1. On January 29, 1979, the government obtained an order authorizing a tap on the telephones at Dorfman's insurance agency. The application for the order stated that there was probable cause to believe that Dorfman was illegally maintaining a hidden interest in three Nevada casinos. The government began monitoring pursuant to this order. Pet. App. 7a.

The order expired after 30 days (see 18 U.S.C. 2518(5)), and the government filed an application for an extension. The application for an extension repeated the allegations contained in the January 29 application but added the allegation of an illegal spe-

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[2] Dorfman and Lombardo were also convicted on all 11 counts. Lombardo was sentenced to a 15-year term of imprisonment, to be followed by five years' probation, and fined $29,000; his conviction was affirmed, and he has sought certiorari (No. 84-585). Dorfman was murdered prior to sentencing, and his case was dismissed as moot (Pet. App. 2a n.1).

[3] The full name of the Fund is "Central States, Southeast and Southwest Areas Pension Fund" (Pet. App. 2a n.2). It was created by collective bargaining agreements between the Teamsters Union and employers; its function is to pay benefits to retired union members (*id.* at 2a).

cial interest in the Aladdin hotel-casino (Pet. App. 7a-8a). This allegation was stated in an affidavit filed by FBI Special Agent Wacks and was supported by transcripts of conversations overheard pursuant to the January 29 order. The extension application was granted on March 1, 1979. *Ibid.*

The government then obtained a series of 30-day authorizations through 1979 and into 1980. The application of April 28, 1979, was the first to allege that Dorfman and others were involved in a conspiracy to bribe Senator Cannon. Pet. App. 8a. The government also obtained and executed an order authorizing the electronic overhearing of conversations in Dorfman's and Webbe's offices. *Ibid.*

2. The Pension Fund acquired the Wonderworld property in 1972 but lost direct control over its management and disposition in 1977, when the Victor Palmieri Company was retained to manage the Fund's real estate assets. The Pension Fund's trustees relinquished managerial control to Palmieri and retained only the right to monitor Palmieri and to remedy breaches of fiduciary duty. Pet. App. 2a-3a. In 1978, Palmieri decided to sell the Wonderworld property. Nearby homeowners, concerned that a high-rise building would be built on the land, organized a homeowner group, selected Senator Cannon as their spokesman, and decided to purchase the land with a view toward having the zoning of the property changed so that it could not be used for high-rise development (*id.* at 3a). At a homeowners' meeting, Senator Cannon offered to call Dorfman to determine whether the group could buy the property directly from the Pension Fund.[4] In addition, the group agreed to Sen-

[4] Dorfman was not then formally associated with the Fund, but his insurance company had previously insured many of the Fund's assets and had offices in the same building that housed the Fund (Pet. App. 3a).

ator Cannon's suggestion that his son-in-law, Robert Bjornsen, serve as the group's agent for the Wonderworld transaction. In late December 1978, Bjornsen initiated contacts with Palmieri. *Ibid.*

On January 8, 1979, the Palmieri Company invited sealed bids for the Wonderworld property. It set several conditions, including a minimum bid of $1.4 million. Two days later, Senator Cannon met in his Las Vegas office with petitioner Williams, then an international vice-president of the Teamsters Union,[5] Dorfman, and Edward Wheeler, a lawyer who represented the Teamsters on legislative matters. Pet. App. 3a-4a. At the meeting, Wheeler voiced the Teamsters' objections to a legislative proposal, recently introduced in Congress, to deregulate the trucking industry (*id.* at 4a). At the conclusion of the presentation, Wheeler left the office, at Williams's request. Williams, Dorfman, and Senator Cannon remained for another 25 to 45 minutes, discussing the Wonderworld property and the homeowners' effort to purchase the land. Williams and Dorfman, seeking to influence Senator Cannon's actions and decisions on the deregulation legislation, offered the Senator and his group the exclusive right to purchase the Wonderworld property for the minimum bid price of $1.4 million. During the next four months, petitioners, Dorfman, and Dorfman's associate, William Webbe, worked to keep this promise. *Ibid.*

On January 12, 1979, Bjornsen submitted a $1.4 million bid on behalf of the homeowners. A bid of $1.6 million was submitted by investor Allen Glick. Palmieri rejected both bids for failure to comply with

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[5] Williams subsequently became the international president of the Teamsters. He resigned that position as a condition of admission to bail (Pet. App. 3a n.3). See *United States* v. *Williams*, 565 F. Supp. 350, 353 n.1 (N.D. Ill. 1983).

other bid conditions. In the absence of other complying bids, however, Palmieri continued to negotiate with Bjorsen, the homeowners' agent, and Glick, the high bidder. Pet. App. 4a.

When Glick resubmitted his offer, raising the amount of the down payment, a Palmieri representative accepted the offer and mailed Glick closing documents on January 29, 1979. At this point, petitioners made a concerted effort to effect the withdrawal of Glick's offer. Pet. App. 4a. The next day, Joseph Lombardo, "whose vocational status is something of a mystery" (*ibid.*), proposed to Dorfman that two Pension Fund representatives—petitioner O'Malley, then a Fund trustee, and petitioner Massa, a former trustee—be sent to talk to Glick (*ibid.*). Williams approved the trip and made an airplane available to O'Malley and Massa (*id.* at 5a).

During a dinner meeting with Glick that evening, O'Malley and Massa candidly explained their intentions: they wanted to defeat legislation pending before Senator Cannon's Senate committee that was inimical to the trucking industry; a homeowners group headed by Senator Cannon wanted to purchase the Wonderworld property; and to secure the Senator's appreciation for their intercession, petitioners O'Malley and Massa asked Glick to withdraw his offer. Glick agreed to withdraw the offer and did so the following day. Pet. App. 5a.[6] Thus, by early March 1979, all competitors were removed from the scene, and Palmieri resumed negotiations with Bjornsen (*ibid.*).

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[6] Subsequently, Glick's partner, Fred Glusman, also withdrew an offer for $1.6 million when Glick told him not to "fight city hall" (Pet. App. 5a).

By then, however, the homeowners had lost interest in purchasing Wonderworld because it appeared that it was going to be zoned to preclude high-rise development in any event (Pet. App. 5a). Nevertheless, Dorfman and Webbe, who were determined to keep their promise to Senator Cannon, helped Bjornsen find a new partner for the purchase—Robert L. Smith, a Las Vegas contractor and business associate of Dorfman (*id.* at 5a-6a). Three bids submitted by Bjornsen on behalf of Smith were rejected by Palmieri because of insufficient down payments, and throughout the final stages of the conspiracy Williams and Dorfman lamented their inability to fulfill the commitment made to Senator Cannon. As late as May 21, 1979, Dorfman assured the Senator that the deal was still "wide open." *Id.* at 6a. On May 25, 1979, however, Palmieri accepted a $1.6 million offer from another corporation, and on July 2 the Wonderworld property was sold (*ibid.*).

3. Before trial, petitioners moved to suppress evidence obtained through electronic surveillance. The district court denied the motion (Pet. App. 44a-131a). The court of appeals affirmed petitioners' convictions, "[f]inding no merit" (*id.* at 2a) in petitioners' various contentions.

ARGUMENT

1. Petitioners contend (84-256 Pet. 9-12)[7] that the district court should have suppressed the contents of 33 conversations overheard pursuant to court orders before April 28, 1979, the date of the first application that alleged a conspiracy to bribe Senator Cannon. Petitioners' argument appears to be that the

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[7] Petitioners O'Malley and Massa seek to adopt petitioner Williams's contentions (see 84-292 Pet. 3 n.1).

orders did not authorize the recording of these conversations (see 84-256 Pet. 9, 11-12) and that the conversations were not so obviously incriminating that they can be analogized to physical evidence that can be seized if found in plain view (*id.* at 10-11). The court of appeals correctly rejected this contention (Pet. App. 15a-19a).

Petitioners ignore the fact that, as this court has recognized, law enforcement officers engaged in electronic surveillance are not—and cannot possibly be—required to avoid intercepting every conversation that turns out not to be related to the offenses specified in the warrant. Because the significance of a conversation often cannot be determined until it is considered in its entirety and in context, agents conducting electronic surveillance "can hardly be expected to know that [a particular] call[] [is] not pertinent" to the offenses specified in the warrant "prior to [the call's] termination." *Scott* v. *United States*, 436 U.S. 128, 140 (1978); see *United States* v. *Chavez*, 533 F.2d 491, 493 (9th Cir.), cert. denied, 426 U.S. 911 (1976); Pet. App. 16a (citing cases). For example, even if an overheard conversation begins on an innocent note, it may then turn to the subject of the authorized investigation. Or calls may be cryptic or may contain guarded conversation and veiled references; to determine the incriminating character of such a conversation, it may be necessary for the agents to review the recording in light of other evidence. See *Scott*, 436 U.S. at 140.

For these reasons, the mere fact that the agents in this case recorded conversations pertaining to the bribery scheme at a time when they were executing a warrant related to the casino interests does not mean that they acted in an unreasonable or unlawful

fashion. Indeed, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, specifically authorizes the use of intercepted "communications relating to offenses other than those specified in the order" authorizing the surveillance (18 U.S.C. 2517(5)). "Evidence of crimes other than those authorized in a wiretap warrant [is lawfully] intercepted * * * when [it is] the by-product of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his illegal activities merely because law enforcement agents are unaware of his diversified criminal portfolio." *United States* v. *McKinnon*, 721 F.2d 19, 23 (1st Cir. 1983) (footnote omitted).

To be sure, agents conducting electronic surveillance may not indiscriminately record every conversation they are able to intercept. They are required to execute the warrant "in such a way as to minimize the interception of communications not otherwise subject to interception" (18 U.S.C. 2518(5)). Moreover, there are statutory limits on the use of intercepted conversations that do not pertain to the offenses specified in the warrant (18 U.S.C. 2517 (5)). But petitioners have not alleged a violation of either of these provisions. See Pet. App. 15a-16a, 19a.

In sum, because the agents complied with the minimization requirement, they executed the warrant in a reasonable fashion, and there was no basis for suppressing the conversations they recorded. Since the 33 conversations concerning the bribery were the product of a reasonable execution of the warrant,

petitioners are incorrect in suggesting that their use at trial must depend on an analogue of the "plain view" doctrine. Petitioners cite three decisions holding that physical evidence that is not described in a warrant, but is in the plain view of officers conducting a search pursuant to a warrant, cannot be seized unless the officers have probable cause at the time of seizure to believe that it is incriminating. 84-256 Pet. 10, citing *United States* v. *Wright*, 667 F.2d 793, 797-799 (9th Cir. 1982); *United States* v. *Clark*, 531 F.2d 928, 932 (8th Cir. 1976); and *United States* v. *Gray*, 484 F.2d 352, 355-356 (6th Cir. 1973), cert. denied, 414 U.S. 1158 (1974). But the justification for the interception and recording of the 33 conversations at issue here is not that there was probable cause, at the time of the interception, to believe that the conversations were incriminating—although the court of appeals suggested that that was true in this case (Pet. App. 17a). Rather, the justification is that the practicalities of electronic surveillance make it reasonable and necessary to allow agents sometimes to record conversations that turn out to be unrelated to the offenses described in the warrant. The limit on the agents' authority is not the requirement of probable cause but the minimization requirement. Contrary to petitioners (84-256 Pet. 11), *United States* v. *Sedovic*, 679 F.2d 1233, 1237 n.4 (8th Cir. 1982); *United States* v. *Masciarelli*, 558 F.2d 1064, 1066-1067 (2d Cir. 1977); and *United States* v. *Johnson*, 539 F.2d 181, 188 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061 (1977), do not suggest that the minimization requirement has been breached if agents record a conversation at a time when they do not have probable cause to believe that it is incriminating; on the contrary, as we have noted, and as this

Court recognized in *Scott*, sometimes even the incriminating nature of conversations that are *related to* the offense described in the warrant will not be revealed until the conversation has been recorded and reviewed in its entirety and in the context of other conversations.

2. 18 U.S.C. 2518(1)(f) requires an application for an extension of an order authorizing a wiretap to include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results." This Court has explained that "the function of § 2518 (1)(f) is to permit the court realistically to appraise the probability that relevant conversations will be overheard in the future. If during the initial period no communications of the kind that had been anticipated had been overheard, the Act requires an adequate explanation for the failure before the necessary findings can be made as a predicate to an extension order." *United States* v. *Giordano*, 416 U.S. 505, 532 (1974). Petitioners contend (84-256 Pet. 12-13) that the government's first application for an extension, filed on March 1, 1979, was invalid because it did not include the explanation required by Section 2518(1)(f).

There is no dispute that the government's application for the March 1 extension included a full account of the results obtained to that point. On its face, the language of Section 2518(1)(f)—which specifies that the government must provide such an account *or* an explanation of the failure to obtain results—seems to require no more. Moreover, the government pointed out in the court of appeals that its application for an extension stated, as an explanation for the failure to obtain more complete results,

that Dorfman was away during the entire first 30-day period. See Pet. App. 9a.

Although the court of appeals said that it would "hesitate" to hold that this statement constituted an adequate explanation of the failure to obtain more complete results (Pet. App. 9a), it rejected petitioners' contention for the following independent reasons (*id.* at 9a-10a; footnote omitted):

> [A]llegations concerning the Aladdin hotel-casino were made first in the March 1 application. Special Agent Wacks alleged in his affidavit that the FBI had intercepted conversations pursuant to the January 29 wiretap order that "concerned the promotion and management of hidden and unlawful interests in the Aladdin hotel-casino." Wacks provided the court with transcripts of the conversations, biographical information on the participants, and the meaning of certain veiled references.
>
> Wacks' allegations and the transcripts of conversations formed an ample basis for the Chief Judge's probable-cause finding * * *. The one-month old allegations concerning other casinos were surplus, and any failure to explain the lack of intercepted calls to substantiate the January 29 allegations was rendered immaterial. Apart from the purportedly inadequate § 2518(1)(f) explanation, the defendants cite, and we have discovered, no other statutory deficiency in the government's March 1 submissions. All predicates for a Title III order were thus satisfied and the Chief Judge properly issued the wiretap authorization.

Petitioners assert (84-256 Pet. 12-13) that this reasoning is inconsistent with *United States* v. *Giordano*, *supra*. But the Court's opinion in *Giordano*

explicitly stated that the extension order in that case was invalid because it was a fruit of surveillance conducted pursuant to an invalid initial order (416 U.S. at 531-532): "It is apparent * * * that the communications intercepted pursuant to the extension order were evidence derived from the communications invalidly intercepted pursuant to the initial order." [8] Petitioners do not allege that the showing of probable cause needed to obtain the extension in this case was in any way derived from an earlier illegal surveillance.

Instead, petitioners appear to advocate a blanket rule that evidence obtained through an extension of a wiretap authorization must always be suppressed if the extension application does not contain an explanation of why the initial surveillance did not obtain more complete results. Such a rule would serve no purpose. The judge who considered the extension application in this case had before him the results of the initial surveillance and could see the extent to which they were incomplete. Ordinarly, unexplained incomplete results from the initial wiretap would *undermine* the government's effort to show that it had probable cause to believe that an extension would bear fruit, whereas an explanation for the incomplete results would help the government show probable cause by explaining why the extension might succeed where the initial surveillance did not. This Court has ruled that suppression is the correct remedy

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[8] The passage that petitioners quote from *Giordano* (84-256 Pet. 13) omits two sentences that make it clear that the basis of the Court's ruling was that there was at least a significant likelihood that the extension order was based on information obtained through execution of the initial, invalid order. See 416 U.S. at 533.

for a violation of Title III only if the violation increases the risk that electronic surveillance will occur in circumstances in which Congress did not intend to authorize it. See *United States* v. *Donovan*, 429 U.S. 413, 432-440 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); *Giordano*, 416 U.S. at 527. The violation alleged by petitioners has, if anything, the opposite effect; it diminishes the likelihood of the government's obtaining a warrant even when probable cause might exist. Suppression is, therefore, clearly not an appropriate remedy.

3. The March 1, 1979, extension authorized the interception of conversations pertaining to the Aladdin hotel-casino because FBI Special Agent Wacks, in an affidavit supporting the extension application, stated that some conversations overheard during the first 30 days' surveillance concerned the "promotion and management of hidden and unlawful financial interests in the Aladdin hotel-casino" (Pet. App. 10a). This statement proved to be in error; the conversations Special Agent Wacks mistakenly believed were about the Aladdin hotel-casino in fact concerned the conspiracy to bribe Senator Cannon (*ibid.*). Petitioners, relying on *Franks* v. *Delaware*, 438 U.S. 154, 171 (1978), sought to suppress the evidence obtained pursuant to the March 1 order on the ground that Special Agent Wacks's statements were intentionally false or made with reckless disregard for the truth.

The district court discussed the legal principles applicable to this claim as follows (Pet. App. 67a-68a):

> *Franks* provides little guidance as to what constitutes "reckless disregard for the truth." A useful analogy, however, is provided by the principle of first amendment law that liability for a defamatory statement regarding a public figure

> cannot be imposed unless the plaintiff proves that the defendant acted with reckless disregard for the truth * * *.
>
> [T]his branch of first amendment law * * * indicates that the reckless disregard for truth required by *Franks* is not established by a mere failure to investigate. Rather, it can only be demonstrated if [petitioners] can establish that the government in fact entertained serious doubts as to the truth of the affidavits or had obvious reasons to doubt the accuracy of the information contained therein.

After conducting a hearing, the district court, in a detailed discussion, rejected petitioners' allegations of a *Franks* violation (*id.* at 77a-90a). The court of appeals agreed that the district court had applied the correct legal principles and upheld its determination as not clearly erroneous (*id.* at 11a-15a). Specifically, the court of appeals, after considering the evidence, concluded that the intercepted "conversations by themselves could have led a reasonable person to conclude that Allen Dorfman and his associates were involved in an effort to acquire, promote, or manage a hidden interest in the Aladdin hotel-casino. And Special Agent Wacks' investigation revealed further facts to support such a thesis." *Id.* at 12a.

Petitioners' sole contention (84-256 Pet. 14) is that because this Court held, in *Bose Corp.* v. *Consumers Union, Inc.*, No. 82-1246 (Apr. 30, 1984), that the clearly erroneous standard does not apply to review of a finding of actual malice in the First Amendment area, the court of appeals erred in applying the clearly erroneous standard in this case to review the district court's finding under *Franks*. But the Court's decision in *Bose Corp.* rested primarily

on the Court's traditional willingness to undertake (and to require other appellate courts to undertake) a more searching review of the application of legal standards to particular factual circumstances in First Amendment cases (see slip op. 12-13) and on the extraordinary significance of a decision that certain speech is without First Amendment protection. See slip op. 18-25; *id.* at 19 ("In such cases [involving allegedly unprotected speech], the Court has regularly conducted an independent review of the record both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited."). Because this is not a First Amendment case, such concerns are not present here.

Moreover, there is nothing in the court of appeals' discussion suggesting that it believed that the district court's findings only marginally satisfied the clearly erroneous standard and would have been reversed under a more exacting standard. On the contrary, it seems clear that the court of appeals would have reached the same conclusion even if it had been required "independently [to] decide" (*Bose Corp.*, slip op. 25) whether the evidence established that Special Agent Wacks acted with reckless disregard for the truth.

4. Petitioners further contend (84-256 Pet. 14-17) that the admission against them of certain of the recorded conversations violated the Confrontation Clause of the Sixth Amendment. Although Webbe and Williams testified at the trial, the other defendants declined to do so and therefore could not be cross-examined on the statements they made during

the recorded conversations. The courts below held that these conversations were not hearsay but were admissible as statements by co-conspirators in furtherance of the conspiracy (Fed. R. Evid. 801(d)(2)(E)), and petitioners no longer take issue with that conclusion.

In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), this Court noted that when hearsay evidence is offered at trial, the Confrontation Clause ordinarily requires a showing that the declarant is unavailable and that his statement bears adequate indicia of reliability. See *id.* at 65-66. The Court added that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* at 66 (footnote omitted). The court of appeals, following established Seventh Circuit precedent, held that co-conspirators' statements constitute a "firmly rooted hearsay exception" within the meaning of *Ohio* v. *Roberts*. See Pet. App. 27a (citing cases).[9] The majority of the courts of appeals have adopted this position. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982); *United States* v. *Bruner*, 657 F.2d 1278, 1285 & n.8 (D.C. Cir. 1981); *United States* v. *Peacock*, 654 F.2d 339, 349-350 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981);

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[9] The co-defendants who chose not to testify were unavailable (see Fed. R. Evid. 804(a)(1)), and in any event the Court stated in *Roberts* that a "demonstration of unavailability * * * is not always required" (448 U.S. at 65 n.7).

United States v. *Marks*, 585 F.2d 164, 170 n.5 (6th Cir. 1978); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). A minority of the courts of appeals have said that they adopt the rule petitioners urge (see 84-256 Pet. 16)—that courts must determine in each case whether the co-conspirator statements bear sufficient indicia of reliability. See, *e.g.*, *United States* v. *Ammar*, 714 F.2d 238, 254-256 (3d Cir.), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976); *United States* v. *Perez*, 658 F.2d 654, 660-662 & n.5 (9th Cir. 1981).[10]

But as at least one court that has adopted petitioner's position has recognized (see *Wright*, 588 F.2d at 38, quoting *United States* v. *Puco*, 476 F.2d 1099 (2d Cir.), cert. denied, 414 U.S. 844 (1973)), this disagreement among the circuits has so far been more apparent than real, because co-conspirator statements that satisfy Rule 801(d)(2)(E) are often made under circumstances that give adequate assurance of their reliability. Indeed, we know of no case, and

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[10] Petitioners also rely on *United States* v. *Vadino*, 680 F.2d 1329, 1334 (11th Cir. 1982), cert. denied, 460 U.S. 1082 (1983). Although the court of appeals in that case remarked, in the course of rejecting a Confrontation Clause challenge to the admission of co-conspirator statements, that the statements possessed indicia of reliability, the court did not address the issue raised by petitioners. Had the court addressed that question, it would presumably have recognized that it was bound by the Fifth Circuit's decision in *United States* v. *Peacock*, *supra*.

petitioners cite none, in which a court of appeals has actually held that statements satisfying the requirement of Fed. R. Evid. 801(d)(2)(E) were nonetheless inadmissible by virtue of the Confrontation Clause; in every decision that endorses the position urged by petitioners, the court of appeals found sufficient indicia of reliability and held that the co-conspirator statements were admissible.

Moreover, petitioners would not be entitled to relief even in the circuits that have announced that they will undertake a case-by-case inquiry, because there are ample indicia of the reliability of the statements at issue here. First, the critical declarations were corroborated by, or were made in the presence of, each of the defendants. Dorfman characterized the "commitment" that was made to Senator Cannon in similar fashion during conversations with petitioner O'Malley (C.A. App. 175, 178, 194-211), petitioner Massa (*id.* at 191-193), Lombardo (*id.* at 194-195), and Webbe (*id.* at 220-229). Dorfman's characterization was further corroborated by the similar characterization given by petitioner Williams in a recorded conversation with Webbe (*id.* at 186-189).

Second, the declarations were captured on tape, rather than being offered through a third party's recollection. The jury therefore had the opportunity to assess the tone, the exact wording, and the context of the declarations. Moreover, Webbe, a witness who was friendly toward petitioners, testified at length about the many conversations to which he was a party; the jury therefore had that aid in assessing the context and meaning of the declarations.

Finally, the declarations were made during the course of the unlawful conduct in this case. Thus they were trustworthy both because they were

against the penal interests of the declarants (see, *e.g.*, *United States* v. *D'Amato*, 493 F.2d 359 (2d Cir.), cert. denied, 419 U.S. 826 (1974)), and because the comments were roughly contemporaneous with the events being discussed and thus were not likely to be the product of a failure of recollection (see *Wright*, 588 F.2d at 37-38). For these reasons, the co-conspirator statements in this case would be admissible in any circuit.[11]

5. Finally, petitioners O'Malley and Massa contend that the district court abused its discretion in denying their post-judgment motion for a new trial on the basis of newly discovered evidence. The "newly discovered evidence" was an affidavit by former FBI Agent H. Edward Tickel stating that before any Title III authorization was obtained, he had participated in surreptitious entries of Dorfman's offices for the purpose of examining their security systems. Tickel speculated that the information he learned about the alarm and security systems enabled the agents who subsequently installed the surveillance devices authorized by Title III to circumvent the security systems. Pet. App. 38a; 84-292 Pet. App. 52a.[12]

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[11] This Court recently declined to review a Seventh Circuit decision applying the rule that petitioners challenge. *Sanson* v. *United States*, cert. denied, No. 83-6454 (June 25, 1984). There is no more reason for the Court to review this case.

[12] Tickel executed the affidavit shortly after being convicted of unrelated offenses he committed while he was an FBI agent. See *Tickel* v. *United States*, cert. denied, No. 84-509 (Nov. 5, 1984). The government's response to petitioners' motion for a new trial undertook to demonstrate that Tickel's affidavit was incredible on its face, and the district court's findings, which we describe below, show that it would have

The district court denied the motion without a hearing on numerous grounds (84-292 Pet. App. 41a-80a). Specifically, the court stated that it doubted whether the evidence came to petitioners' attention only after trial (*id.* at 53a-54a); that it doubted whether petitioners had exercised due diligence in uncovering the evidence (*id.* at 54a-55a); and that petitioners lacked "standing" to assert Tickel's alleged actions as a basis for suppressing evidence, since those actions did not violate petitioners' rights under the Fourth Amendment or Title III (*id.* at 56a-65a). In addition, the district court stated (*id.* at 68a-70a; footnotes omitted):

> [Petitioners'] showing that the microphones could not have been installed in Dorfman's and Webbe's offices and the evidence used at trial could not have been obtained but for the illegality is deficient.
>
> First, the Tickel affidavit and uncontroverted affidavits submitted by the government indicate that the FBI had independent sources for all of the information supplied by Tickel as a result of the unlawful entries. The affidavits indicate that the government was able to enter the building with [a] magnetic card, that a confidential informant gave it information needed to defeat Amalgamated's [(Dorfman's offices')] alarm system, and that the phone company also gave it information that enabled it to defeat the system. The affidavits indicate that these independent sources not only could have been but in fact

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been pointless for the government to have conducted the illegal entries described in Tickel's affidavit. See pages 21-22, *infra*.

were used to defeat the alarms and place the microphones after the [Title III] order was issued. Thus, [petitioners] have not shown that the unlawful entries enabled the government to obtain evidence that it would not have lawfully obtained absent the illegality.

Second, even if entries into Amalgamated were necessary to learn about Amalgamated's alarm system, there is no showing that they would have not been speedily accomplished legally after the [Title III] order issued. It is clear that once an authorization for Title III surveillance issues, the government may surreptitiously enter the target's premises to plant microphones. See *Dalia* v. *United States*, 441 U.S. 238 * * * (1979). * * * There is no reason that, absent the earlier entries, the government would not have speedily and lawfully had Tickel enter the building and do exactly the same things he alleges he did earlier to enable the FBI to defeat the alarm system. * * * Thus, absent the earlier entries the FBI still would have developed the information to defeat the alarm system in time to intercept all of the conversations offered at trial. Finally, the Tickel affidavit indicates that the unlawful entries were entirely unnecessary. * * * [S]urveillance revealed that the cleaning people left the doors unlocked, the alarm off and the offices unattended every day. Tickel [according to his affidavit] used this fact to enter the office [on one occasion]. That being the case, the FBI would easily have slipped into the offices and planted the microphones immediately after [obtaining the warrant] without ever having to defeat the alarm system. Thus, the government would have intercepted the conversations offered at trial absent the unlawful conduct.

The court of appeals stated (Pet. App. 38a): "We could affirm on any of several grounds, but will select the most obvious one—the defendants' lack of standing." This ruling was clearly correct. As this Court held in *United States* v. *Payner*, 447 U.S. 727, 731 (1980) (emphasis in original), a party's "Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party. *Rakas* v. *Illinois*, 439 U.S. [128,] 143 [(1978).]" While Tickel's alleged actions may have violated Dorfman's rights, petitioners do not claim that they had any protected interest in the areas Tickel supposedly entered. They are therefore not entitled to any relief on the basis of Tickel's alleged actions.

Petitioners appear to assert that they are entitled to relief because their conversations were intercepted "as a result of [the] surreptitious entries" (84-292 Pet. 10) or "[a]s a consequence" of the entries (*id.* at 11). But even assuming that petitioners' assumptions are correct—that, contrary to the district court's findings, the surveillance could not have been accomplished without the alleged illegal entries, and that a lawful search is "tainted" if unlawful activity was previously undertaken to remove private security devices that would have foiled the search (cf. *Segura* v. *United States*, No. 82-5298 (July 5, 1984), slip op. 19-20)—petitioners labor under a fundamental misunderstanding of the applicable law. As both courts below noted, it is well established that "a defendant may not successfully challenge the admissibility of evidence on the basis that the evidence is tainted [by] (or 'the fruit of') some past infringement of another's rights." Pet. App. 39a (citing cases); see 84-

292 Pet. App. 60a-61a (citing cases); *id.* at 64a-65a (citing cases).[13] The doctrine that a party may seek suppression only if his own Fourth Amendment rights have been violated necessarily means that evidence directly discovered by an unlawful search of Dorfman's office could be admitted against petitioners. It follows that there is certainly no difficulty in admitting evidence—the contents of the recorded conversations—that was not discovered directly through the alleged illegal search but was supposedly at the end of a speculative causal chain that began with such a search.[14]

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[13] Petitioners do not take issue with the consistent holding of these cases; instead, they attempt to distinguish them on the ground that "[h]ere, of course, the entire purpose of the unlawful entries was to gather information to facilitate the interception of petitioners' conversations" (84-292 Pet. 13 n.13). But this is just an argument for treating the evidence gained from the electronic surveillance as "fruits" of the unlawful entries. It is not a reason for concluding that the entries themselves violated petitioners' rights under the Fourth Amendment or Title III.

[14] Petitioners' reliance (84-292 Pet. 15-16) on *United States* v. *Dorfman*, 690 F.2d 1217 (7th Cir. 1982), an earlier decision related to this prosecution, is puzzling. In *Dorfman*, the persons seeking to suppress evidence were parties to conversations that, they alleged, were intercepted in violation of Title III (or the Fourth Amendment). They were alleging, therefore, that their own rights had been violated; the only question was whether suppression was the proper remedy. Petitioners fail to allege that the supposed illegal entry violated their rights.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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